

*a***PP****v.****MD ALIM SAMAD***b*

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CRIMINAL TRIALS NO: 45-5-97 & 45-6-97]
11 AUGUST 1997

c

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in cannabis - Possession of drugs - Accused and four others had access to house where cannabis was discovered - Whether accused had possession of drugs - Evidence of chemist - Chemist agreed that 'Indian Hemp' was synonymous with cannabis - Whether offence proved -*

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EVIDENCE: *Similar facts - Evidence to show state of mind - Whether admissible*

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The accused was detained by the police at the front of his rented house. A bodily search revealed that the accused had with him a waist pouch containing 2.79 gm of dried leaves confirmed later to be cannabis. The accused, who was handcuffed, then led police to the house and therein the police arrested four other occupiers of the house. Upon searching the house, in the room occupied by one of the four, the police found 14.2 gm of cannabis and for that the said occupier was charged for possession of the drugs. In the accused's room, however, the police party discovered 997.79 gm of dried leaves confirmed later to be cannabis. The facts also showed that, upon examining the kitchen of the house, the police had further discovered, in a locked tool box, 480.9 gm of cannabis. The key to the tool box was taken from the clenched fist of the accused, and that being so, two charges under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act') were levelled against the accused, namely, for trafficking in 997.79 gm and 480.9 gm of cannabis respectively.

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It was not in dispute that, following the discovery of the cannabis in the waist pouch aforesaid, a separate charge under s. 6 of the Act had been preferred against the accused. That being the case, before the learned judge herein, questions *inter alia* arose as to (i) whether the prosecution could admit the drugs in the waist pouch to show that the accused had knowledge of the drugs found in the house; (ii) whether the accused was in possession of the drugs found in the house, considering that there were others who had access to the house; and (iii) whether the drugs were actually cannabis as defined in s. 2 of Act.

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Held:

- [1] The cannabis recovered in the waist pouch was admissible in evidence. While it is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of a criminal act other than that covered by the present charges, for the purpose of leading to the conclusion that he is a person likely to have committed the offence or offences for which he is standing trial, the mere fact that the evidence adduced tends to show the commission of another offence does not render it inadmissible if it be relevant to an issue before the court, and it may be so relevant if it is indicative of a state of mind, such as intention.
- [1a] In this case however, the drugs discovered in the waist pouch could not be used to show that the accused had knowledge of the drugs indicated in the charges as there were other personalities who had access to the said house.
- [2] Since others had access to the house, the prosecution could not be said to have proved that the accused had possession of the said drugs.
- [3] Although the chemist testified that the dangerous drugs were cannabis within the definition in s. 2 of the DDA, there were doubts which arose when the chemist also agreed that 'Indian Hemp' was synonymous with cannabis. By conceding that the offending exhibits could also be 'Indian Hemp', the subject matter of both charges were nullified.

[Accused acquitted and discharged.]

Case(s) referred to:

Abu Bakar Ismail v. Regina [1954] 20 MLJ 67 (**fol**)
Amrita Lal Hazra v. Emperor 42 Cal 957 (**refd**)
X v. PP [1951] 17 MLJ 10 (**refd**)
Gooi Loo Seng v. PP [1993] 3 CLJ 1 (**fol**)
Lee Chee Meng v. PP [1992] 1 CLJ 345 (**cit**)
Mohd Yusof Said v. PP [1996] 2 CLJ 13 (**dist**)
Ng Kook Kin v. PP [1995] 3 CLJ 905 (**fol**)
PP v. Amir Mahmood & Ors [1996] 5 MLJ 159 (**refd**)
PP v. Roslim Harun [1993] 3 CLJ 505 (**cit**)
PP v. Sulaiman Mohamad Noor [1996] 1 MLJ 196 (**refd**)
Seaford Court Estates Ltd v. Asher [1949] 2 All ER 155 (**refd**)
Shukri Mohamad v. PP [1995] 3 CLJ 799 (**refd**)
Warburton v. Loveland [1832] 2 D & CL 480 (**cit**)
Wong Yew Ming v. PP [1991] 2 CLJ 946 (**cit**)

a Legislation referred to:

Criminal Procedure Code, s. 165(i)

Dangerous Drugs Act 1952, ss. 6, 37(a), (b), (d), (da)(vi), (g), 39B(1)(a), (2)

Dangerous Drugs Act (Amendment of First Schedule) Order 1996, ss. 2, 45A

For the prosecution - Ishak Mohd Yusoff DPP

b *For the accused - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co*

Reported by Marriette Peters-Goh & WA Sharif

JUDGMENT

c Abdul Malik Ishak J:

In this case the accused was charged with two offences. Firstly, in criminal trial number 45-5-97 he was charged for trafficking in 480.9 grammes of cannabis alleged to have been committed on 12 June 1996, at about 10.40am at the kitchen area of house no: 15, Jalan Mawar 38, Taman Mawar, Pasir Gudang, in the district of Johor Bahru, in the State of Johore, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act. Secondly, in criminal trial number 45-6-97 he was charged for trafficking in 997.79 grammes of cannabis alleged to have been committed on 12 June 1996, at about 10.40am at room number 3 of house no: 15, Jalan Mawar 38, Taman Mawar, Pasir Gudang, in the district of Johor Bahru, in the district of Johor Bahru, in the State of Johore, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act.

f At the commencement of the trial, the learned deputy public prosecutor, in the person of Mr. Ishak bin Mohd. Yusoff, rightly applied for these two offences to be tried together. It is instructive to mention that s. 163 of the Criminal Procedure Code (F.M.S. Cap 6) ("CPC") provides, firstly, that every distinct offence must be set out in a separate charge, and, secondly, every charge must be tried separately. Here, s. 165(i) of the CPC fits squarely into the matter and applies for the benefit of the prosecution. As can be seen there is one accused person, the offences are committed in a series of acts, the acts are so connected together as to form the same transaction and there are more than one offence. Section 165(i) of the CPC enacts as follows:

h If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

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and the word “transaction” appearing therein must necessarily mean “carrying through” which suggests proximity of time as well as continuity of action and purpose (*R v. Shahapurkar* ILR 30. Bom. 49). It is also instructive to note that in order that a number of acts may be so connected together as to form part of the same transaction, the essential elements would be community of purpose or design and continuity of action. *Amrita Lal Hazra v. Emperor* 42 Cal. 957 is a classic example. There it was held that there was no definite formula which may be used as a guideline to determine whether two or more acts form the same transaction. Invariably, the courts must take into account the following matters – not in its order of priority: proximity of time, unity or proximity of place, continuity of action, and continuity of purpose or design. For these reasons, the two offences were tried together.

The evidence as unfolded revealed the following facts. On 12 June 1996 at about 10.30am, ASP Imran bin Abdul Rahman (“ASP Imran”) accompanied by Inspector Jafri bin Muhamad (“Inspector Jafri”) and Detective Sergeant Major Badron bin Ismail (“Detective Badron”) proceeded to house number 15, Jalan Mawar 38, Taman Mawar, Pasir Gudang, in the district of Johor Bahru, in the State of Johore (hereinafter referred to as the “said house”). The police party was in civilian clothes and as they approached the said house they saw a male Malay (later identified as the accused) washing a car in front of the said house. ASP Imran introduced his office and detained the accused. A bodily search was conducted on the accused by ASP Imran. A waist pouch (exh. P44) tucked at the waist of the accused was seized and an examination of its contents revealed dried leaves suspected to be cannabis. As events unfolded the government chemist analysed the dried leaves and confirmed it to weigh 2.79 grammes of the purported cannabis. The recovery of the purported cannabis in the waist pouch was a subject matter of a police report vide Pasir Gudang report no: 1579/96. It must be emphasised that the purported cannabis found in the waist pouch was not part and parcel of the charges levied against the accused in the present hearing. But Mr. Ishak bin Mohd. Yusof, the learned deputy public prosecutor, brought in evidence by way of examination-in-chief that the accused was charged in the Magistrate’s Court for possession of the purported cannabis in the waist pouch and the case was still pending. In fact, Chief Inspector Ahmad Hairohman testified that the accused faced a charge under s. 6 of the Dangerous Drugs Act 1952 (“DDA”) before the Magistrate’s Court, Johor Bahru vide case no: A83-1061-96 for possession of 2.79 grammes of the purported cannabis in the waist pouch. Be that as it may, ASP Imran then ordered Detective Badron to handcuff both the hands of the accused to the front. This was done. ASP Imran held onto the waist pouch that contained the purported cannabis and then proceeded to examine the car which bore registration number JBS 2811 and nothing incriminating was found therein. From there, the police party escorted the

- a* accused and entered the said house. The front wooden door was behind a metal grilled door which was left ajar. The front wooden door was closed but not locked and as the police party entered the living room accompanied by the accused, they saw a male Malay known as Razali bin Rejab ("Razali") who was resting and placed him under arrest. Of course, before effecting the arrest, ASP Imran had identified his office to Razali.
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- ASP Imran then proceeded to examine the middle room (second room) and he found a male Malay known as Mohd. Salehin bin Nasir ("Salehin") who was asleep in that room. ASP Imran woke up Salehin, identified his office and placed Salehin under arrest. ASP Imran then proceeded to escort, with the aid of the other two police personnel, the accused, Razali and Salehin to the front room (first room). There, a male Malay known as Shukri bin Jaffar ("Shukri") was seen sleeping and ASP Imran woke him up, introduced his office and placed Shukri under arrest. At this juncture, ASP Imran directed Inspector Jafri to place and guard Razali, Salehin and Shukri in the front room (first room). This was done. Then ASP Imran assisted by Detective Badron escorted the accused to the rear portion of the said house. They heard someone was taking a bath in the bathroom. ASP Imran knocked at the door of the bathroom and a male Malay known as Mohd Saini bin Majid ("Saini") came out. Without furtherado, ASP Imran introduced his office and placed Saini under arrest. Saini was then escorted to the front room (first room) to be guarded by Inspector Jafri.
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- Once again with the assistance of detective Badron, ASP Imran escorted the accused and proceeded to the back room (the third room as per the charge). The door to the third room was closed but not locked. A key was attached to the key hole and ASP Imran tested the key and discovered it fitted the door of the third room. That key was able to lock and unlock the door to the third room. That key bore number 31 and ASP Imran seized the key and kept it in his pocket. In the course of the trial, evidence was led to show that this key number 31 was missing and therefore it was not marked as an exhibit. The investigating officer in the person of Chief Inspector Ahmad Hairohman explained that the key number 31 which was held by him was somehow missing and this happened when his office moved from Jalan Mahmoodiah to the police contingent in Johor Bahru. Be that as it may, ASP Imran entered the third room accompanied by the accused and Detective Badron. An examination of the third room was conducted by ASP Imran. In the drawer of the dressing table (photograph P11K), ASP Imran found a package wrapped in a Malay language newspaper dated 19 May 1996. Inside that newspaper package, two packets of dried leaves which the government chemist confirmed to be 10.7 grammes of the purported cannabis was found. In the green plastic
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cupboard (photograph P11L) of the third room, ASP Imran also recovered two packets of plastic containing what the government chemist said to be 8.4 grammes of purported cannabis. At the bottom portion of that green plastic cupboard (photograph P11L), ASP Imran found a bundle of empty plastic wrappers measuring 3 inch by 5 inch (exh. P36) and 5 inch by 8 inch (exh. P37) respectively. Of interest, would be the evidence of ASP Imran who testified that while in the third room he saw the accused clenched his right fist and he found a bunch of three keys (exhs. P39, P40 and P41) held by the accused therein. ASP Imran seized that bunch of three keys from the accused. This piece of evidence was not corroborated by detective Badron and this would be shown later. In the third room, ASP Imran saw the ceiling boards being removed as seen at photographs P11M and P11N and, using a stool as seen at photograph P11L, ASP Imran climbed and found a “Sakuni laundry bag” (exh. P21) as seen at photograph P21A. On examination of exh. P21, ASP Imran found compressed dried leaves wrapped in a transparent plastic containing what the government chemist said to be 978.6 grammes of purported cannabis. It was in evidence that exh. P21 could not be seen from the third room unless the individual climbed and examined the ceiling. It must be emphasised that the examination of the third room was conducted in the presence of the accused and detective Badron. It is germane to mention that according to the government chemist the total weight of the purported cannabis found in the third room was 997.7 grammes which perfectly tallied with the requisition and the consent from the learned deputy public prosecutor in exh. P4 but the amended charge in exh. (P2) showed the weight to be 997.79 grammes. Throughout the trial, the learned deputy public prosecutor was relying on this amended charge as reflected in exh. (P2). One wonders where did the learned deputy public prosecutor obtain the additional 0.09 grammes.

From there, ASP Imran proceeded to the kitchen portion of the said house as reflected at photograph P11E. On the kitchen floor, ASP Imran seized a dark blue coloured bag with brand name “RECCO” (photograph P12G and exh. P15) and, upon examining its contents, found a yellow coloured tool box (photograph 12H and exh. P29) which was padlocked. The brand of the padlock was “ROCK” (exh. P38) and using one of the keys taken earlier from the clenched fist of the accused, to be precise the key was also of the “ROCK” brand (exh. P39), ASP Imran managed to open the yellow coloured tool box. Inside it ASP Imran found 31 packets containing dried leaves and 2 plastic packets each containing compressed dried leaves which the government chemist said to be 480.9 grammes of purported cannabis which formed the basis of the charge in criminal trial number 45-5-97. It must be emphasised that ASP Imran demonstrated in open court that the key with brand name “ROCK” (exh. P39) was able to open the padlock with brand name “ROCK” (exh. P38). ASP Imran also demonstrated that the keys with brand names “WD” (exh. P40)

- a* and “3 circles” (exh. P41) could not unlock the padlock with brand name “ROCK” (exh. P38). Incidentally, there were remnants of the purported cannabis in the yellow coloured tool box weighing 0.38 grammes and somehow this was not incorporated as part and parcel of the charge, in relation to the recovery of the purported cannabis in the kitchen area of the said house, in
- b* the present trial. ASP Imran then put back the 33 packets and its contents into the yellow coloured tool box, padlocked it and then put them inside the black coloured “RECCO” bag and handed the same to detective Badron for supervision. ASP Imran continued to hold onto the key (exh. P39). In the kitchen also ASP Imran seized a red coloured weighing scale with brand name “ACCURA” as reflected in photograph P12I and exh. (P16).
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- Still inside the said house, ASP Imran proceeded to examine the middle room (second room) in the presence of Razali. In the red plastic cupboard (photograph P11H), ASP Imran found 12 plastic packets containing dried leaves (photograph P12D) which the government chemist said to be 14.2
- d* grammes of purported cannabis. Chief Inspector Ahmad Hairohman testified that Razali was charged in the Magistrate’s Court Johor Bahru *vide* case number B83-1060-96 under s. 6 of the DDA and he pleaded guilty thereto for possession of 14.2 grammes of purported cannabis and was sentenced to 12 months’ imprisonment *wef*, 12 June 1996. Razali has since served his jail
- e* term and had been released on 12 February 1997. Attempts to trace Razali proved futile.

- Now, the recovery and seizure of the purported cannabis inside the said house was made a subject matter of a police report *vide* Pasir Gudang report number 1581/1996.
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- In the said house, ASP Imran thereafter proceeded to examine the front room (first room) and the living room area. No incriminating articles were found there. The accused and the rest of the suspects, namely Razali, Shukri, Salehin and Saini were then brought to the police station with the help of the other
- g* police personnel. All the exhibits that were seized were taken to the police station and subsequently handed to the investigating officer. Sufficient evidence was led to show that the movements of the exhibits were all accounted for till they were produced before this court.

- The said house was owned by Yahaya bin Md. Latim (“Yahaya”) and he gave evidence for the prosecution. Yahaya testified that he purchased the said house in January 1995 and when the said house was ready for occupation he rented it to Nan Dahari for RM520 per month. Yahaya identified the said house as shown in photographs P11A, P11B, P11C, and P11D. There was no tenancy agreement and the said house was rented out on 1 November 1995. Rental
- i* receipts were issued as reflected at exh. P14. Yahaya gave a set of keys to

Nan Dahari. During the subsistence of that tenancy, Yahaya testified that he did not enter the said house even when he collected the monthly rental. Yahaya was not able to say where Nan Dahari was now.

Shukri gave evidence for the prosecution. Shukri testified that he stayed in the said house for a period of three months before his arrest. Through Shukri, the prosecution established beyond reasonable doubt the occupants of the said house. Certainly it was a bachelor's pad. The front room (first room) was occupied by Shukri and Nan Dahari. The middle room (second room) was occupied by Razali and Salehin. The back room (third room) was occupied by the accused alone. The keys to the bedrooms were kept by the occupants individually. Thus, each occupant has one key to his own room. Shukri testified that on the day the police raided the said house he was arrested. Also arrested and who were present at the said house were Razali, Salehin and the accused. At the time the police party raided the said house, Nan Dahari was not in. It was Shukri's evidence that Saini was a house guest and he was there to take his bath. All of them knew Saini and the latter was regarded as their mutual friend. Shukri was quite blunt when he said that he did not know the present whereabouts of Razali, Salehin, Saini and Nan Dahari. No cooking was done in the kitchen as all the occupants purchased their meals from outside. Shukri was categorical that on 10 June 1996 and 11 June 1996 he did not enter the accused's room. Shukri knew that the police recovered drugs in the accused's room, particularly at the ceiling portion, and also at the kitchen area; elsewhere he did not know. Shukri testified that the police examined the front room (first room) in his presence and nothing incriminating was found therein. Shukri rented the front room (first room) at RM110 per month and he paid the rental to Nan Dahari every month. When shown the dark blue coloured bag with brand name "RECCO" as per exh. P15 and as seen in photograph P12G, Shukri said that he never saw that bag on 10 June 1996 and on 11 June 1996. Shukri too denied that he ever saw the weighing machine as reflected in photograph P121 and exh. P16. Shukri said that if there were no one in the said house, the front wooden door would be locked and the grilled door would be unlocked. Of pertinence would be the damning evidence which Shukri testified and which received vehement objections by Mr. Hisham Teh Poh Teik, the learned defence counsel for the accused. That evidence was this. Throughout Shukri's stay in the said house he had smoked "ganja" and it was the accused that gave him the "ganja" – the local jargon for cannabis. On the morning of 12 June 1996, the accused gave "ganja" to Shukri in the said house. Prior to 12 June 1996, the accused had given on ten occasions "ganja" to Shukri to smoke. This was used as a leverage by the learned deputy public prosecutor when he submitted that by the same token "ganja" was kept by the accused in the third room on 10 previous occasions. Shukri testified that

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- a* he saw the accused took the “ganja” from the third room – the room occupied by the accused. According to Shukri, the accused gave the “ganja” to him free of charge and each time it was in a small fraction only. In regard to the “ganja” that was found in the ceiling, Shukri said that it did not belong to him. Shukri testified that Saini visited the said house to take his bath and for that purpose he changed at the middle room (second room).

- b* Under cross-examination, Shukri testified that he did not know where Nan Dahari and Razali were. He knew that Razali smoked “ganja” with him and he also knew that the police recovered “ganja” from Razali’s room. He admitted that on the morning of 12 June 1996, the police arrested the accused,
- c* Razali, Saini and Salehin apart from himself. He agreed that Saini, Salehin and himself were released after being detained for 14 days. He knew that Razali was not released after being arrested and that Razali was charged in the Magistrate’s Court. However, he did not know that Razali had pleaded guilty before the magistrate and was convicted and sentenced to 12 months’
- d* imprisonment. Of crucial importance was the admission by Shukri that there were other friends that visited the said house to sleep, take a bath or chit-chat and these other friends were said to be Ali, Zali and Man. Shukri too admitted that Hamidon, Hamid, Ayob also came to the said house to take a bath, to sleep and to talk. There were others that visited the said house but
- e* he could not recall their names. According to Shukri, these personalities that came to the said house were the friends of the accused, Nan Dahari, Salehin, Zahari and himself. Shukri testified further that he worked at a furniture factory in the evenings between 5pm to 7am and between those times if Ali, Zali, Man, Hamidon, Hamid, Ayob, Hassan and other friends were to visit the said
- f* house he would not know. Shukri agreed that these friends came to the said house to bath, to sleep and to talk and in pursuance of these purposes they had free access to the kitchen, the front room (first room), the middle room (second room) and the back room (third room). Shukri testified that he gave a statement to the police where he admitted smoking “ganja” but he was never charged for doing so. It was put to Shukri and he agreed that he was not
- g* charged in the Magistrate’s court for smoking “ganja” because the police wanted to use him as a witness against the accused. But Shukri categorically stated that the police did not direct him to tell the court that the accused gave him “ganja” to smoke. Shukri too agreed that Razali gave him “ganja” to smoke. Shukri was adamant that the accused gave him “ganja” to smoke and
- h* that whatever he said in court was not a lie. Shukri too said that he was not lying when he testified that the accused gave him “ganja” to smoke.

- i* Shukri’s re-examination was short. This was what he said. That he did not know the addresses nor the identity card numbers of Ali, Zali, Man, Hamidon, Hamid, Ayob, Hassan and the rest of the friends. That he voluntarily gave a statement to the police. That he knew that Razali smoked “ganja” but he did not know where Razali obtained his supply from.

The accessibility of all the rooms including the kitchen portion in the said house to those personalities have been emphasised, repeatedly, by Shukri. ASP Imran too was cross-examined at length on the same point. ASP Imran agreed that Razali, Shukri, Salehin and Saini could enter the accused's room in the said house. ASP Imran agreed these four people could also climb up the ceiling in the accused's room and proceed to the dressing table in the accused's room where the drugs were recovered. These four people too had access, according to ASP Imran, to the kitchen and the middle room (second room) of the said house.

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Now, from the facts several observations must be made and highlighted.

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Firstly, the recovery of the purported 2.79 grammes of cannabis from the waist pouch was a subject matter of a different police report from that of the two charges which the accused are facing. Consequently, they are not related to the two charges presently tried before this court. The charge against the accused for possession of that 2.79 grammes of the purported cannabis under s. 6 of the DDA are still pending before the Magistrate's Court, Johor Bahru. The admissibility of that recovery in the waist pouch is beyond dispute and this is supported by the decision of Foster-Sutton CJ in *X v. Public Prosecutor* [1951] 17 MLJ 10 CA where his Lordship in a short compelling judgment reviewed the facts and categorically laid down the law as follows:

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Evidence was led by the prosecution to show that the appellant consorted with bandits who visited the same estate on the 27 October 1950, and that during their visit he aided and abetted them. This evidence was admitted after a submission by the deputy public prosecutor that it was admissible under s. 11(b) of the Evidence Ordinance 1950, as going to show that the money demanded was, in fact, intended for the use of the bandits.

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On hearing of this appeal Mr. Nair, on behalf of the appellant, submitted that the evidence as to the latter incident was inadmissible as it tended to show that the accused had been guilty of a criminal act other than the one covered by the charge, that the two acts did not form part of the same transaction and that an interval of fourteen days is too remote, alternatively, 'that if the evidence was admissible on any technical ground it should not have been admitted because it was too prejudicial to the accused.

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While it is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of a criminal act other than that covered by the charge, for the purpose of leading to the conclusion that he is a person likely from his criminal conduct to have committed the offence for which he is standing his trial, the mere fact that the evidence adduced tends to show the commission of another offence does not render it inadmissible if it be relevant to an issue before the Court, and it may be so relevant if it is indicative of a state of mind, such as intention.

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- a** The issue of similar fact evidence surfaced once again in the case of *Abu Bakar bin Ismail v. Regina* [1954] 20 MLJ 67 where Brown J said:

b The third ground of appeal relates to what has been called the 'similar acts' evidence. The prosecution called evidence to prove that on eight occasions, between the 29th of September and the 29th of October 1952, the appellant had made similar endorsements to the effect that he had seen Federation driving licences in the case of eight applicants whose forms he had filed in, and that in none of the eight cases had the applicant produced a Federation driving licence for his inspection.

c The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved: see *Reg. v. Rearden* (4 F. & F. 76); or are material to the question whether the acts alleged to constitute the crime were designed or accidental: see *Reg. v. Gray* (4 F. & F. 1102); or to rebut a defence which would otherwise be open to the accused: see *Makin v. Attorney-General for New South Wales* [1894] A.C. 57). As is pointed out in the last mentioned case, the statement of these general principles is easy; in applying them it is often very difficult

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e to draw the line and decide whether a particular piece of evidence is admissible or not.

This quotation is from *Rex v. Bond* [1906] 2 K.B. at page 394. In the present case it is said that the evidence to which objection is taken was admissible to rebut the defence that what purported to be Federation driving licences were in fact produced to the appellant but were forgeries. It is said that the issue in these charges was whether the endorsements which the appellant made on the two application forms which were the subject of the charges were false to his knowledge, and that the fact that he had, within a month shortly before the two occasions in respect of which he was charged, made similar endorsements in eight cases without having the Federation licences produced to him was material to that issue.

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But the sting of the recovery of the drugs in the waist pouch are greatly circumscribed by the fact that other personalities had access to the said house.

h Secondly, notwithstanding that Razali and Salehin shared the same room, the prosecution, in its wisdom, decided to charge Razali alone for the recovery of the purported 14.2 grammes of cannabis in that room (this was the middle or the second room) in the magistrate's court and Razali had pleaded guilty thereto and had served his sentence of 12 months' imprisonment and had since been released and now untraceable. There was no evidence that Razali obtained the drugs, for which he pleaded guilty to, from the accused. Shukri testified

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that he knew that Razali smoked “ganja” but he did not know where Razali obtained his stock from. Thus, the drugs found in the room occupied by Razali and Salehin cannot be connected to the accused.

Thirdly, the prosecution sought to connect the drugs found in the waist pouch to the drugs found in the accused’s room to show that the accused had knowledge of the drugs inside the accused’s room. In the same vein, the prosecution sought to co-relate the admission of Shukri that the accused gave him on ten occasions small fractions of “ganja” to smoke to show knowledge and that the possession of the drugs by the accused was not accidental on the authority of *Wong Yew Ming v. Public Prosecutor* [1991] 1 MLJ 31 SC which was applied vigorously in *Public Prosecutor v. Roslim bin Harun* [1993] 3 CLJ 505. The prosecution relied on the statutory presumptions as found in ss. 37(a), (b), (d), (da) (vi) and (g) of the DDA. These statutory presumptions are rebuttable on the balance of probabilities and, in my judgment, they have been rebutted by the evidence of the prosecution. It must be emphasised that these statutory presumptions must be read with the factual matrix of the present case especially that part which showed that the said house was easily accessible to others particularly room number three and the kitchen portion. In the context of the statutory presumption under s. 37(da) (vi) of the DDA, the evidence of the government chemist made inroads into and created serious doubts as to the subject matter of the charges on the balance of probabilities of which I have more to say in the later part of this judgment. It must not be forgotten that there was ample evidence to show that all the rooms and the kitchen in the said house were accessible to Ali, Zali, Man, Hamidon, Hamid, Ayob, Hassan and a host of other unnamed personalities that used to frequent the said house. ASP Imran agreed that co-tenants like Razali, Shukri and Salehin together with the unfortunate visitor in the person of Saini who was arrested while having his bath in the said house – all had access to the accused’s room as well as the kitchen to the said house. Razali, Shukri, Salehin and Saini were said to be capable of climbing the ceiling in the accused’s room and they too could proceed to the dressing table in the accused’s room where the drugs were recovered. This was clearly the case where others had access to the accused’s room. Even if the accused had knowledge of the presence of the purported cannabis in his room, at the places mentioned in the early part of this judgment, that by itself would be insufficient to establish possession or control of the purported cannabis given the scenario that others too had access to the accused’s room and could have concealed the purported cannabis there. This was the very reasoning adopted by Edgar Joseph Jr. SCJ (now FCJ) in *Gooi Loo Seng v. Public Prosecutor* [1993] 2 AMR 27: 1135; [1993] 2 MLJ 137. His Lordship succinctly said (at p. 1141 line 6 of AMR; at p. 142 - MLJ):

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- a* We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant
- b* but that of others as well.

In my judgment, on the facts of the present case, the proverbial cap might have fitted not just the head of the accused but that of Razali, Shukri, Salehin, Saini, Ali, Zali, Man, Hamidon, Ayob, Hassan and a host of other unnamed personalities that frequented the said house.

- c*
- Fourthly, the doubt as to the exclusive use of room number 3 (as per the charge) by the accused, by itself, would be a sufficient ground to discharge and acquit the accused of the charge pertaining to the recovery of the purported cannabis in room number three on the authority of *Lee Chee Meng v. Public Prosecutor* [1992] 1 MLJ 323 SC without having to call for his defence. This was my judgment and I so hold accordingly.
- d*

- Fifthly, to connect the accused with the purported cannabis found in the yellow coloured tool box (exh. P29 and photograph P12H), the prosecution through ASP Imran stated that a bunch of three keys (exhs. P39, P40 and P41) seized from the clenched right fist of the accused in room number 3, particularly the key bearing the "ROCK" brand (exh. P39) was able to open the padlock which bore the brand name "ROCK" that was used to lock the yellow coloured tool box. In my judgment, the evidence of ASP Imran in regard to the seizure of the bunch of three keys from the clenched right fist of the accused in room number 3 was far fetched and could not be believed for the following reasons:
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- f*

- (a) When the accused was first arrested outside the said house, ASP Imran made a bodily search on the accused and nothing incriminating was found on him except the waist pouch that was worn by the accused. Detective Badron testified under examination-in-chief that at that juncture he did not notice that anything was held by the accused. It must be recalled that it was detective Badron that handcuffed both hands of the accused to the front after discovery of the purported cannabis in the waist pouch. Indeed, if the accused held in his clenched right fist the bunch of three keys as alleged by ASP Imran then surely detective Badron would have noticed it and he himself would seize it. This was not the case here. ASP Imran under cross-examination admitted that when the accused was arrested, he did not see the accused held onto a bunch of three keys in the clenched right fist of the accused. ASP Imran further agreed under cross-examination that if the accused held a bunch of three keys in his clenched right fist at the time of the arrest, ASP Imran would have significantly
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- i*

noticed it. The crucial question to pose would be this: Was the accused given the opportunity, after his arrest and after both his hands had been handcuffed to the front by detective Badron, to hold onto the bunch of three keys in his clenched right fist? No opportunity was accorded or was opened to the accused to do this for the simple reason that he was being guarded by detective Badron attentively and the movements of the accused were significantly monitored. ASP Imran did not testify under oath that he saw the accused took a bunch of three keys from someone or from some part of the said house. Incidentally, detective Badron testified under examination-in-chief that when he escorted the accused to the kitchen accompanied by ASP Imran, he saw ASP Imran opened the yellow coloured tool box (exh. P29) with a key as that tool box was padlocked at the material time. But, and this is the material evidence, detective Badron could not remember where ASP Imran took that key from. There was thus no corroboration by detective Badron of the evidence of ASP Imran in regard to this aspect of the case. At the close of the case for the prosecution there were two conflicting versions in regard to this aspect of the case. In such a situation, the prosecution could not be said to have proved its case beyond reasonable doubt. The law on the standard of proof required of the prosecution at the close of its case is finally settled and that is beyond a reasonable doubt. This is amplified in the case of *Arulpragasam a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597; [1997] 1 MLJ 1; [1997] 1 AMR 5: 329; [1997] 1 JCr 68, where Tun Mohd Eusoff Chin CJ of the Federal Court succinctly said:

It is trite law that the onus is on the prosecution throughout the entire case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, i.e. at the close of the prosecution.

- (b) Since the standard of proof required from the prosecution at the close of its case is beyond all reasonable doubt standard of proof, then a maximum evaluation of the evidence tendered by the prosecution must be undertaken. It follows that “a more credible test of credibility” must be applied to the prosecution’s evidence as envisaged in *Arulpragasam*. Viewing the evidence from all angles, it can be argued that the bunch of three keys recovered from the clenched fist of the right hand of the accused, if believed as being the truth (though the evidence of Detective Badron went the other way), that did not mean that there was no duplicate to those keys at the material time. ASP Imran was cross-examined, particularly in regard to the key as per exh. P39 that was able to open the padlock to the yellow coloured tool box, and it was stressed to him that there was a duplicate to exh. P39. In reply ASP Imran said that he could not be certain

- a* that there was a duplicate to exh. P39. Then again, ASP Imran testified that he made a search of the front room (first room) and nothing incriminating was found. But that search was focused centrally on the recovery of drugs and not for the duplicates of the bunch of three keys, in particular the duplicate to exh. P39. Another angle would be this. With
- b* respect, ASP Imran was telling a lie in regard to the recovery of the bunch of three keys in the clenched right fist of the accused because why should the accused after being arrested held those keys in his clenched right fist which would certainly connect him to the incriminating contents of the yellow coloured tool box. This brings to the forefront the relevant passages in the judgment of Edgar Joseph Jr. FCJ in Arulpragasam. His Lordship
- c* lucidly pointed out that:

- d* In evaluating the testimony of the security guard, Ravi Shankar, the judge rightly regarded as material the fact that this witness and the appellant were strangers. His Lordship then went on to conclude that such being the case, he could think of no reason why this witness should do such a vicious thing as to invent a story implicating the appellant in a capital offence. True it is that there was no animosity between the appellant and this witness, but if there was no reason on the one hand for a false accusation, there was equally no reason, on the other, for the appellant, to run the unnecessary risk of making the highly incriminating disclosure
- e* alleged to a total stranger, who he knew was a security guard, then to leave the brown bag with the cannabis in it virtually in the latter's charge, while he went for a leisurely breakfast, well knowing that it would be the security guard's duty to report the matter to authorities. The audacity of the alleged disclosure is lacking alike in cunning and contrivance. It is difficult indeed to associate simplicity so absolute with a course so
- f* perilous: the risks of detection were very great and the consequences of detection calamitous. Yet, nowhere in his judgment did the judge even mention these formidable factors which told in favour of the appellant. The judge had thus failed to view the relevant facts from all angles and the appellant was undoubtedly prejudiced thereby.

- g* Indeed it was mind boggling to even consider the perilous course undertaken by the accused in holding onto the bunch of three keys in his clenched right fist after the accused was arrested and had both his hands handcuffed to the front. Detective Badron was not able to corroborate ASP Imran on this crucial aspect of the case. For these reasons, the charge of trafficking in the purported
- h* cannabis at the kitchen area of the said house was not proved beyond reasonable doubt. The accused was entitled in law to be acquitted and discharged without his defence being called.

i

The Subject Matter Of The Two Charges

There was a doubt as to whether the subject matter was indeed cannabis within the meaning of s. 2 of the DDA. True it is that the government chemist testified that the dangerous drugs were cannabis as defined under s. 2 of the DDA but that evidence was peppered with doubts so crucial that it went to the substratum of the whole case. Under cross-examination, the government chemist agreed that Indian Hemp is synonymous with cannabis. The government chemist too agreed that Indian Hemp is the same as cannabis. Of crucial importance was the assertions by the government chemist that he could not deny that the exhs. in P20 (the drugs found in the yellow coloured tool box), P23 (the drugs found in the ceiling of the accused's room), P24 (the drugs found in the green plastic cupboard located in the accused's room), P26 (the drugs found in the dressing table located in the accused's room), P29A (the remnants of the drugs in the yellow coloured tool box) and P31 (the drugs found in the waist pouch) were Indian Hems. It is germane to point out that the words "Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)" that appeared in Part III of the First Schedule to the DDA have been deleted by P.U.A. 170/1996 via Dangerous Drugs (Amendment of First Schedule) Order 1996 that came into effect on 12 April 1996. A dangerous drug is defined in s. 2 of the DDA to mean "any drug or substance which is for the time being comprised in the First Schedule." Since the government chemist agreed that exhs. P20, P23, P24, P26, P29A and even P31 were "Indian Hems", it follows that with the amendment as illustrated above the drugs were no longer dangerous and in fact were harmless and in the eyes of the law, lawful. The concessions by the government chemist that the offending exhibits as alleged could also be Indian Hems nullified the subject matter of both charges. The Minister under s. 45A(c) of the DDA considered it expedient that the words "Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)" be deleted from the statute book. That there was this deletion is clear and explicit and this court must give effect to it. Of course, the draftsmen played a major role in drafting that amendment. But in so doing the draftsmen in an attempt to avoid the pitfalls of *Public Prosecutor v. Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196 and *Public Prosecutor v. Amir bin Mahmood & Ors* [1996] 5 MLJ 159 deleted entirely the words "Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)" and inserted after the item "Etoxeridine" in Part III of the First Schedule to the DDA, the following items:

Extract or tincture of cannabis.
Extract or tincture of coca leaves.
Extract or tincture of opium.

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- a* In *Public Prosecutor v. Sulaiman bin Mohamad Noor (supra)*, the court there held that:

An expert, like the government chemist, must be very selective in the use of words when testifying in court. A wrong choice of words would be fatal especially when it involves a penal statute that carries with it the mandatory death penalty.

b

In *Public Prosecutor v. Amir bin Mahmood & Ors (supra)*, the court there succinctly said:

- c* But alas, under cross-examination the government chemist emphatically stated that : ‘... Indian Hemp adalah synonym kepada cannabis’ and he agreed that : ‘... Indian Hemp serupa dengan cannabis.

And further down the judgment of the same case, the court remarked:

- d* It is my judgment that the subject matter of the offence can also be regarded as cannabis (Indian Hemp). Since there is this nagging doubt, the benefit of it should be given to the three accused persons.

- e* Factually, the Federal Court’s decision in *Mohd. Yusof bin Said v. Public Prosecutor* [1996] 1 MLJ 640 are poles apart from the present case. There the government chemist did not allude to the fact that Indian Hemp is synonymous with cannabis nor did the government chemist say that Indian Hemp is the same as cannabis. Neither did the government chemist categorically say in that case that the drugs in question were Indian Hems. Mohamed Dzaidin FCJ who wrote the decision for the Federal Court in *Mohd. Yusof bin Said* took pains in differentiating *Shukri bin Mohamad v. Public Prosecutor* [1995] 3 MLJ 229 in the following terms:

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- g* First, on this particular aspect of PW1’s evidence, it is quite clear to us that his evidence did not stop at: ‘I mean cannabis as defined under DDA 1952’ as in *Shukri* and *Saime*. He went a step further by qualifying that ‘resin had not been extracted’, which no doubt is one of the ingredients of the definition of ‘cannabis’ in section 2, i.e. ‘any part of any plant of the genus *Cannabis* from which the resin has not been extracted’. [Emphasis added]. In *Shukri*, the chemist said nothing about the resin. Thus, in substance, PW1 had the section 2 definition in mind.

- h* In another part of the judgment in the same case, his Lordship Mohamed Dzaidin FCJ continued:

- i* Thirdly, unlike *Shukri*, the learned judge at least adverted to the chemist’s evidence that the plant material was cannabis as defined under DDA 1952 in his grounds of judgment, although falling into error by not stating the words ‘section 2’.

Therefore, from the combined effect of the evidence of the chemist, PW1, which are clearly distinguishable from Shukri, we have no hesitation in coming to the conclusion that his omission to state that by 'cannabis' he meant cannabis as defined under section 2 of the DDA 1952, has not given rise to the inference that he did not have in mind the ingredients of 'cannabis' in the said section.

a

Why did the government chemist in the present case testify that the subject matter was Indian Hemp? Why didn't the government chemist deny that the subject matter was not Indian Hemp so as to establish beyond all reasonable doubt as to the identity of the subject matter? The answers are simple. The subject matter in question is also Indian Hemp and not purely cannabis as defined in s. 2 of the DDA.

b**c**

Judges are fettered by the supposed rule that they must look to the language employed and nothing else, and when faced by poor drafting judges can do nothing but to lament that the draftsmen have not provided for certain things or that they have deleted certain words, like the present case, or that the draftsmen have been guilty of some ambiguity. Lord Denning LJ in *Seaford Court Estates, Ltd v. Asher* [1949] 2 All ER 155, 164 aptly said:

d

It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity.

It has been said, time and again, that "the words of the statute speak the intention of the Legislature" (per Tindal CJ in *Warburton v. Loveland* [1832] 2 D. & CL. 480, especially at p. 489). The Dangerous Drugs (Amendment of First Schedule) Order 1996 in clear unambiguous words deleted the crucial words "Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)", and I have no choice but to interpret it as such. On statutory interpretation, I did say in *Ng Kook Kin v. Public Prosecutor* [1995] 3 CLJ 905; [1995] 2 MLJ 35 the following words, which must surely apply to the present case:

e**f**

As Lord Diplock said: 'Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities ...' (*Duport Steels v. Sirs* [1980] 1 ALL E.R. 529 at page 541; [1980] 1 WLR 142 at page 157). Even if there is any ambiguity, which is not detectable here, the construction which is in favour of the freedom of the individual should be adopted (*David v. De Silva* [1934] AC 106 and *O'Connor v. Issacs* [1956] 2 Q.B. 288; [1956] 2 ALL E.R. 417; [1956] 3 WLR 172). In my judgment, since the words in s. 20 of the Act are themselves precise and unambiguous, then one need not go any further than to expound those words in their ordinary and natural sense. Put in another way, the words themselves alone best declare the intention of the lawgiver: see *Sussex (Peerage) Case* (1844) 11 Cl & Fin 85 at page 143 and *Cargo ex Argos, Gaudet v. Brown* [1873] LR 5 PC 134 at page 153.

g**h****i**

- a* There is no ambiguity at all to the Dangerous Drugs (Amendment of First Schedule) Order 1996 and there is only one construction to it and that construction favours the liberty of the accused. The sting of “Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp)” as a dangerous drug has been taken away by that amendment, and since the purported cannabis which
- b* the accused was said to traffick was indeed Indian Hemp then the accused had not committed any offence known to law and in law. This was my judgment and I so hold accordingly. The accused was, in law, entitled to be acquitted and discharged, on the balance of probabilities, of both charges without his defence being called.

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